***United States Court of Appeals***

***for the Second Circuit***

# SUPPLEMENTAL BRIEF

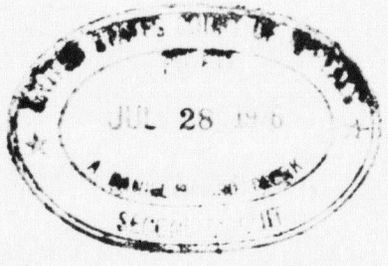
# No. 76-4085

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

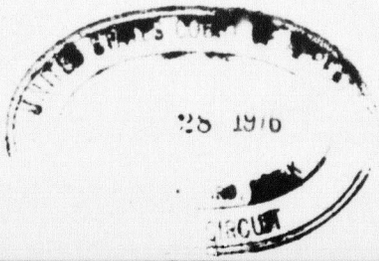
| | | |
|---|---|---|
| State of New York, Petitioner, | ) | |
| vs. | ) | |
| The United States of America | ) | Docket No. 76-4085 |
| and | ) | |
| Interstate Commerce Commission, Respondents. | ) | |

B
B/S

PETITION FOR REVIEW
OF A DECISION OF THE
INTERSTATE COMMERCE COMMISSION




Dated: July 27, 1976




Reply Brief on Behalf of
S & E Shipping Corp.
Intervenor in Support of
Petitioner

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# REPLY BRIEF OF S & E SHIPPING CORP.

The S & E Shipping Corp., intervenor in support of Petitioner State of New York, in accordance with Rule 31 of the Federal Rules of Appellate Procedure, submits this brief in reply to respondents' briefs and in opposition to the validity of orders of the Interstate Commerce Commission.

## S & E SHIPPING HAS STANDING BEFORE THIS COURT

Respondents Interstate Commerce Commission, Department of Justice, Soo Line Railroad and ConAgra used about five times the space in their reply briefs trying to keep S & E out of Court as they used trying to persuade the Court their way about the merits of the dispute.

When they stopped questioning the antecedents of S & E they argued that we do not belong in Court because we did not follow the Commission's rules.

For good measure, Soo and ConAgra admonished us for some of our adjectives, such as referring to the shipper as having acted "shrewdly" or that the railroads were "muscling" out Great Lakes water carriers who were established in the trade.*

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* We are indebted to respondents for calling to our attention that we mis-spelled the word "muscling". First we were going to say that the railroads were using substantial "muscle". Then we thought about the Great Lakes carriers being "muscled" out of the grain business. But, considering our theme that the Commission had an obligation to regard the competitive effect of carrier practices under the National Transportation Policy, we settled for the thought that a stronger mode was "muscling" out an established carrier of another mode. In our concern about whether or not to double the "l" we forgot about the "e". We got the "l" right but we missed the "e". Maybe the best lesson here is that it is dangerous to use a noun like "muscle" as a verb, as in "to muscle" the Great Lakes carriers.

In any event, Soo and ConAgra do not hold a candle to S & E on use of colorful adjectives. Key to our overall argument in this case is that Buffalo is the milling center of the country and that no one has complained about transportation service in or out of Buffalo - not the shippers, millers, consumers, lake carriers, port authorities or any of the working people (or their unions) who work for these interests - or even the government. And yet, Soo and ConAgra refer in their brief (page 46) to Buffalo as having a "stranglehold" on the grain traffic and that such city is a "bottleneck". This is a particularly irresponsible word. The expert relied on for this conclusion is their own witness, the Soo Line Vice President, but his testimony (summarized on pp. 8 - 13 of the Soo/ ConAgra brief) neither states the word nor the thought that the reason the shipper detoured Buffalo was because it was a bottleneck.

Perhaps in this exchange of descriptive words to express inner thoughts these respondents are finally tipping their hand on what this case is about; i.e. competition between modes - fair or unfair?

Otherwise, they ignored us.

But we do not intend to be ignored.

The facts make us confident that the Court will listen and decide that we are legitimate and therefore have standing before this Court. Facts such as:

> The Kinsman Marine Transit Company was a party to ICC Docket No. 8899
>
> Kinsman, represented by this counsel, withdrew as a separate party to the proceeding but advised the Commission that "Kinsman will pursue its interests in this matter as a member of the Lake Carriers Association, another protestant in this proceeding." (No. 83, CIR.).
>
> Lake Carriers Association Exhibit (No. 7, CIR) identifies Kinsman as a member.
>
> The Lake Carriers Association, including Kinsman as one of its members, was a party to the ICC proceeding from beginning to end.
>
> S & E Shipping Corp. is a successor in interest to Kinsman by reason of having purchased all of Kinsman's assets, employed all its personnel and secured all its shipping contracts to support operation of the vessels acquired from Kinsman.

On these facts, S & E has standing before this Court because it was a dues paying and policy making member of an association which was a party throughout the proceeding. In any event, respondents did not oppose the petition of

S & E to intervene and have not taken any formal action inconsistent with our standing as a party before this Court.

ICC DECISION, FEBRUARY 11, 1976 IS THE FINAL ORDER FOR REVIEW

Respondents would dismiss the Petition as not having been timely filed.

The Petition was timely filed because it was based on a final order of the Commission on February 11, 1976.

Facts again control, such as:

In 1972 the ICC suspended the first set of grain rates from Twin Ports and Twin Cities because, among other things, it was illegal due to a tie-in guarantee arrangement on tonnage.

The railroads then withdrew the rates.

New tariffs proposed the same set of rates.

These rates were suspended.

In the Commission's first decision, one rate was found to be unlawful.

In its Order of August 5, 1975, the Commission "reopened the proceeding on the present record"following certain denial and grant of petitions for reconsideration.

In this same Order on August 5, 1975, after acting on petitions for reconsideration, the Commission permitted the Commonwealth of Pennsylvania to intervene to respond to the State of New York which had filed a brief on the merits of all substantial issues in the proceeding.

Subsequent to the petition for reconsideration from the Board of Trade of Chicago protesting respondents' tariffs, the railroads amended the tariff, "thereby eliminating the objections of the Chicago Board." (Soo/ConAgra brief p.5)

In its decision of February 11, 1976 the Commission, in its own formal headnote in the case, set out what it had reconsidered on appeal:

> "Upon reconsideration, proposed unit-train rates on wheat from Minneapolis, Minnesota Transfer, St. Paul and Duluth, Minn., and Superior, Wis., to apply at different levels during the seasons of open and closed navigation on the Great Lakes, found just and reasonable and not otherwise unlawful. Proceeding discontinued". (Emphasis added).

The Commission, in its decision of February 11, 1976:

- Described the proceeding as "highly controverted".
- Said that what was "In issue" upon reconsideration was suspended rates on wheat "from Twin Cities and Twin Ports to Martins Creek." (Emphasis added).
- Adopted and affirmed the findings and conclusions reached in the prior report in all respects, except as stated.

In its decision of February 11, 1976 addressing the matter of rates from Twin Cities, the Commission found such rates to be lawful on the basis that the distance between Twin Cities and Twin Ports of 160 miles is immaterial, in order to give grain producers the choice of marketing at Twin Cities or Twin Ports - "a choice which has been preserved in the past by maintaining rate parity."

Two of the three Commissioners who issued the decision on February 11, 1976 were not the same Commissioners who issued the decision on July 18, 1974.

There were no other issues in Docket No. 8899 but the lawfulness of the set of grain rates from Twin Ports and Twin Cities.

On such see-saw facts as to the outcome of the proceeding before the ICC there is no reasonable basis to deprive a disappointed party before the Commission his day in Court because he did not appeal to the Court from the Commission's decision on August 5, 1975.

The most that can be said for the respondents' view of the matter is that the Commission was unsure it had issued a final order on August 5, 1975.

There was no statutory, jurisdictional or substantially unfair issue prejudicial to the interests of the supporters of the agency decision, as in the Tucker case (U.S. v. L.A. Tucker Truck Lines, Inc. 344 U.S. 67 (1952) which is relied on so substantially by respondents here. Instead, the issues and parties were clear from the beginning. And there were no surprise changes.

This case was found to be highly controversial as to a set of rates. The case is not a series of separate

actions in one proceeding such as to permit a possible finding that a final order had been issued by an administrative agency as to certain parties, or certain issues, separate and distinct from other parties or issues in the same proceeding. To the contrary, the railroads published a set of tariffs to apply from Twin Ports and Twin Cities. No doubt Soo and ConAgra would not have argued so strenuously that the summer rates from Twin Cities should have been found to be lawful if it were not imperative in setting up the competitive rail service to ensure shipper interest in the common market served by Twin Ports and Twin Cities.

Indeed, it was on the basis that Twin Cities and Twin Ports had to be considered as common points of origin for shippers that the Commission, on February 11, 1976, approved the summer rates from Twin Cities; thus suggesting strongly that the Commission was still considering the case as a whole at that time.

To the extent equity is a consideration inthe Court's consideration of the question when the right of the disappointed parties matured to Petition for Review, the Court should recall the admission of counsel for the ICC in oral argument before this Court on June 15, 1976 that his

predecessor in office (now a Commissioner at the ICC) had given an opinion to the counsel from the State of New York that the decision of the Commission on August 5, 1975 was not a final order as to set time limits running for such Petition to Review. Under these circumstances, the support by the ICC of the Motion to Partially Dismiss this Review Petition made by Soo and ConAgra is not in keeping with our notion of the highest degree of professional legal conduct.

This Court denied such motion after briefs and oral argument on June 15, 1976. The Court should again dismiss such motion.

ON THE MERITS, THE RATES DESTROY COMPETITION IN VIOLATION OF THE NATIONAL TRANSPORTATION POLICY.

As the ICC elected not to respond on the merits, except for Section 3(1) of the Act, the Court should accept contentions by S & E* that:

(i) The Interstate Commerce Commission is "Philosophically and Fundamentally Opposed to Water

* Intervenor, S & E, relies on and incorporates by reference all its arguments in its brief submitted June 10, 1976.

Carriers Being Exempt from Regulation By the ICC in the Carriage of Dry-Bulk Commodities" which can be inferred from the efforts by the Commission since 1954 to persuade the Congress to repeal such exemption only to find, instead, that the Congress extended the exemption, constituting thereby a prejudice, conscious or otherwise, against S & E and other bulk commodity lake carriers in intermodal competition with strictly regulated carriers, like railroads;

(ii) "Section 15a(3), Rule of Rate-Making, Does Not Apply to Exempt Water Carriers," as confirmed by the Supreme Court in the Ingot Molds case, American Commercial Lines, Inc. v. Louisville and Nashville Railroad Co. 392 U.S. 571 (1968), but which exemption was erroneously disregarded by the ICC in the instant case by ruling against the lake carriers because they did not present detailed cost information; and

(iii) The Commission, in considering protection needed by water carriers under the National Transportation Policy, erroneously failed to review "Other Statutes which

the Interstate Commerce Commission Must Consider in Implementing National Transportation Policy", the most important of which is the Merchant Marine Act of 1936, particularly as amended in 1970, in which the Congress, almost unanimously on a roll-call vote, for the first time, made substantial tax and other financial relief available to Great Lakes carriers, in the exempt trades.

Actually, the Commission should have given no thought to relative costs of service between the railroads and lake carriers. It is not scientific and probably will not go uncontested to say that everyone who knows anything about rate-making knows that the lake carriers in the carriage of exempt dry-bulk commodities are the low cost carrier and thus have the inherent advantage over other modes of transportation. The wheel need not be discovered with each experiment. Thus, from the beginning the railroads pegged their rates to match water rates. With a new, substantial and aggressive miller ready to compete in the flour market, the railroads could put together, probably at compensatory rates, an attractive transportation package for the shipper.

But the introduction of this new package has the decidedly potential effect of completely changing trading patterns in the movement of grain from the upper mid-west states for milling and distribution in the eastern states.

Unlike the existing unit train rate to Buffalo (authorized by the Commission in 1965 in Docket No. 34381) in which the railroad rate was kept so much higher than the lake rate that only about one percent of the grain was diverted to the railroad, the situation in the instant case is much different. The combination of rate and year round service which the railroads here can provide and the fact that the shipper would be totally independent of lake carriers suggests the beginning of dramatically new transportation and distribution patterns in the movement of grain to the eastern markets.

The Commission seems not to be concerned with the effect such change could have on the ability of lake carriers to continue to provide service, for national defense and commerce, in the carriage of iron ore, coal etc. or to the people in the industry who depend on the continuance of the established (for almost 150 years) transportation system. Instead the

Commission speaks of the need for information about costs and about the "character" of operations of water carriers. It has taken extremely narrow and erroneous views (as with reliance on Section 15a(3) rule-making authority) of its responsibilities in judging this very substantial intermodal rate-making case. The Commission has seemed to be more comfortable in making measurements as, for example, between Twin Ports and Twin Cities, or as between Buffalo and Martins Creek, than it has on judgment issues such as the public interest under the National Transportation Policy. And yet, this is on what the Court relied very recently in Lake Carriers' Association v. United States and Interstate Commerce Commission, 399 F. Supp. 386 (1975). Respondents pass this case too lightly.

In reversing the Commission and protecting the water carriers in that case (involving, as here, competition between regulated railroads and unregulated Great Lakes water carriers) the three judge Court repeatedly stressed public interest considerations as the basis for its decision.

The ICC (at brief, p. 21) and Soo/ConAgra (at brief p. 57) would have this Court disregard the findings in

the Lake Carrier's case because, again, the lake carriers in the instant case did not provide cost information for this Court to make findings concerning the relative cost of moving wheat in unit trains versus a lake-rail route.

This argument on the need for cost evidence is shopworn. What real difference does it make about relative costs when the railroads deliberately, step for step, match ("equalized" is preferred by Soo/ConAgra p. 57) lake carrier prices?

Such prices are determined by the law of supply and demand. The Ingot Molds case established that exempt lake carriers are not subject to the rule of rate-making under Section 15a(3). The decision in Arrow Transportation Co. v. U.S. 176 F. Supp. 411 (N.D. Ala. 1959) Aff'd sub nom. 361 U.S. 353 (1969) and other cases previously cited by S & E (p. 64 initial brief) establish that courts have frequently intervened after decisions by the ICC to protect the unregulated carrier from predatory acts of the regulated carriers, usually a railroad. And, in the Lake Carriers case the court stated:

> "The history of the passage of the National Transportation Policy indicates that one of

> its primary purposes is to protect water carriers from discrimination against them by railroads." (p. 391).

Thus, the ICC failed to sufficiently regard its statutory obligation to protect exempt water carriers from railroad competition.

The Lake Carriers case decided in 1975, is strong in our favor and the proponents for application of rigid cost standards cannot distinguish it from the instant case, particularly as that decision serves as very substantial precedent here that the Court - and thus the Commission - must make broad policy judgments, in the public interest, on the competitive effect of a rate on another mode of transportation - depending on the facts.

In our case, the facts point clearly to a finding that the unit-train grain rates will have competitively destructive effect on lake carrier transportation of grain. Thus, such rates should be found by this Court to be in violation of the National Transportation Policy and,

accordingly, unlawful. And, S & E Shipping Corp. respectfully requests that this Court so find.

Respectfully submitted,

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Arthur N. Chagaris

Attorneys for
S & E Shipping Corp., Intervenor

Certificate of Service

I hereby certify that I have this 27th day of July, 1976, served two (2) copies of the foregoing Brief via first-class mail, postage prepaid, to counsel for each party of record.

Robert J. Ables